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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GROVER THOMAS, Defendant and Appellant.	E046411 (Super.Ct.No. FSB703993) OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed as modified.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Elizabeth S. Voorhies, Deputy Attorneys General, for Plaintiff and Respondent.

In a bifurcated proceeding, a jury found defendant guilty of second degree robbery (Pen. Code, § 211)[1] and deadlocked as to the charge of kidnapping to commit robbery[2] (§ 209, subd. (b)(1)). The trial court thereafter found true that defendant had sustained four prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), four prior serious felony convictions (§ 667, subd. (a)(1)), and two prior prison terms (§ 667.5, subd. (b)) as alleged in the amended information. Defendant was sentenced to a total term of 50 years to life in state prison. Defendant's sole contention on appeal is that the trial court erroneously, and in violation of his federal constitutional rights to due process and a fair trial, instructed the jury with pattern jury instructions pursuant to CALCRIM Nos. 223, 226, and 302. We reject this contention and affirm the judgment.

Though not raised by either party, we note that there are errors in the trial court's minute orders and abstract of judgment, which conflict with the court's oral pronouncement of judgment. We will order those errors corrected.

I

FACTUAL BACKGROUND

During the early morning hours of October 7, 2007, several individuals restrained a security guard at gunpoint after punching him in the face and then stole $46,620 worth

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The trial court later dismissed this charge upon motion by the People.

of dog food from Mars Pet Care, a pet food manufacturing plant located in San Bernardino.

The following day, a man named Michael Smith, who was accompanied by his brother, defendant, and defendant's stepson, sold multiple bags of the stolen dog food to a local merchant. Defendant's stepson was an employee at Mars Pet Care.

Later that same day, a San Bernardino police officer contacted defendant at his apartment and took him into custody on a domestic violence matter. From the backseat of the patrol car, defendant initiated a conversation about the pet food robbery. He provided detailed and corroborated facts about the crime, and in doing so, implicated himself, his wife, his stepson, Michael Smith, Smith's brother, and an additional unidentified man. In a tape-recorded interview, which was played for the jury at trial, defendant later identified himself as the driver of one of the getaway trucks and further stated that his wife and stepson acted as lookouts at the crime scene.

At trial, defendant denied involvement in the robbery and explained he had falsely implicated himself and his wife because he was angry at his stepsons, who had beat him up.

II

DISCUSSION

Without objection, the trial court instructed the jury with CALCRIM Nos. 223 (direct and circumstantial evidence), 226 (witness credibility) and 302 (evaluating conflicting proof). Defendant contends these instructions impermissibly lessened and

shifted the prosecution's burden of proof of beyond a reasonable doubt and, therefore, violated his constitutional rights to due process and a fair trial.

Preliminarily, although an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant were affected thereby (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503-506), failure to object forfeits the issue unless the error affects the defendant's substantial rights. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) We therefore review the challenged instructions to determine if defendant's rights were affected by the instructions—that is, "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) "'[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.'" (*People v. Huggins* (2006) 38 Cal.4th 175, 192.)

In deciding whether jury instructions correctly convey the law, the reviewing court must look to the instructions as a whole to see whether there is a reasonable likelihood the jury misunderstood the instructions. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Jurors are presumed to be intelligent and capable of understanding and correlating jury instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

A. *CALCRIM Nos. 223 and 226*

CALCRIM No. 223 defines direct and circumstantial evidence and explains the difference between the two. The portion of CALCRIM No. 223 that defendant challenges was read by the trial court as follows: "Both direct and circumstantial evidence are

acceptable types of evidence *to prove or disprove* the elements of the charge or an allegation including those related to intent and the acts necessary to a conviction or a true finding and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact and issue has been proved based upon all the evidence." (Italics added.) Defendant claims the italicized instructional language "falsely indicated to jurors that [defendant] was not entitled to merely rely on the state of the evidence, but instead had an affirmative obligation to present evidence to 'disprove' the charge[d] [offense]." (Underscoring omitted.)

CALCRIM No. 226 provides guidance for assessing witness credibility. As given by the trial court here, it read: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice that you may have including any that could be based on disability, gender, race, religion, ethnicity, sexual orientation, gender, identity, age, national origin or any socio-economic status. You may believe all, part or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

"In evaluating a witness's testimony, you may consider anything that reasonably tends to *prove or disprove* the truth or accuracy of that testimony." (Italics added.) The court thereafter listed the factors the jurors may consider.

Defendant asserts that, like CALCRIM No. 223, CALCRIM No. 226 "similarly inverted the burden of proof," in that the highlighted language "improperly instructed [the jurors] that they may evaluate the credibility of witnesses so as to 'disprove' one or more elements of the offense," and impermissibly lightens the prosecution's burden of proof.

Neither instruction suggests a defendant bears any burden of proof at trial. CALCRIM No. 223 accurately states that either direct or circumstantial evidence may disprove the elements of a charge. This statement does not implicitly or explicitly suggest the defendant has any burden of proof, especially when read in conjunction with the reasonable doubt instruction, CALCRIM No. 220. There was no misstatement of law or error in this pattern instruction. (*People v. Ibarra* (2007)156 Cal.App.4th 1174, 1186-1187; see also *People v. Anderson*, *supra*, 152 Cal.App.4th at p. 930.)

The same is true in regard to CALCRIM No. 226. CALCRIM No. 226 cannot reasonably be understood to mean that the defense has the burden of disproving the charge. It tells the jury that it must judge the credibility or believability of the witnesses and outlines some considerations bearing on the jury's determination of credibility. This pattern instruction mirrors the criteria set out in the Evidence Code as a general catalog of those matters having any tendency in reason to affect the credibility of a witness. (Evid. Code, § 780.) The language at issue is not the focal part of the instruction. The crucial point of CALCRIM No. 226 is to inform jurors that they should not automatically reject or discredit a witness because of discrepancies and inconsistencies in the testimony.

CALCRIM No. 226 is an accurate statement of the law. (*People v. Ibarra, supra*, 156 Cal.App.4th at p. 1188; see also *People v. Campos* (2007) 156 Cal.App.4th 1228, 1240.)

The sole basis for defendant's challenge appears to be the instructions' use of the word "disprove." However, it is accurate that evidence—either presented by the People or by the defendant—can establish that an element of the charged crimes has not been met. Reasonable jurors would not make the mammoth logical leap from mere use of the word "disprove" to a conclusion that the defendant bears a burden of proof.

Contrary to his claim, defendant advances essentially the same arguments rejected in *People v. Anderson*, *supra*, 152 Cal.App.4th at pages 929-934, 938-940, and *People v. Ibarra*, *supra*, 156 Cal.App.4th at pages 1186-1188. We adopt the reasoning of those two decisions and hold that the trial court neither erred nor denied defendant due process or a fair trial by giving these instructions.

B. *CALCRIM No. 302*

CALCRIM No. 302 provides guidance regarding the evaluation of conflicting evidence. As given by the trial court here, CALCRIM No. 302 read: "If you determine there is a conflict in the evidence, you must decide *what evidence, if any, to believe*. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of a greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or from a desire to favor one side or the other. What is important is whether the testimony or any other

evidence convinces you, not just the number of witnesses who testify as to a certain point."

Defendant challenges the italicized language in the instruction, claiming the instruction "improperly suggested that the trial and evaluation of evidence involved simple, discrete issues of 'belief' and 'disbelief,'" and as stated "implied that mere 'disbelief' of evidence offered in support of [defendant] was sufficient to sustain a conviction." It thereby "weakened" the proof beyond a reasonable doubt standard.

Defendant's complaints about CALCRIM No. 302 are unpersuasive. He merely focuses as a particular sentence, taking a solitary word or phrase out of context, rather than evaluating "the instructions given as a whole . . . ." (*People v. Rundle* (2008) 43 Cal.4th 76, 149.) CALCRIM No. 302 does not suggest, explicitly or implicitly, that the defendant has the burden of proof to show his innocence or disprove the People's evidence. It simply states the accurate and unobjectionable proposition that jurors must decide what evidence, "'if any,'" to believe. The instruction tells the jury how to evaluate conflicting evidence, "if" the jury determines there is a conflict in the evidence.

CALCRIM No. 220, not CALCRIM No. 302, sets forth the People's burden of proof. CALCRIM No. 220 clearly informed the jury that "[a] defendant in a criminal case is presumed to be innocent" and the People must "prove a defendant guilty beyond a reasonable doubt." Reading the instructions as a whole, no reasonable juror would have deduced, from the aforementioned portion of CALCRIM No. 302, that defendant had any

burden of proof or that the proof beyond a reasonable doubt was "weakened," as defendant suggests.

CALCRIM No. 302 does not create an improper presumption, nor does it create a conflict between the presumption of innocence and the admonition that the jury not favor one side or the other. (*People v. Ibarra*, *supra*, 156 Cal.App.4th at p. 1191.) "It merely cautions the jurors not to disregard testimony on a whim. In this regard, CALCRIM No. 302 is no different from CALJIC No. 2.22, which cautions jurors not to disregard the testimony of the greater number of witnesses 'merely from caprice, whim or prejudice.'" (*People v. Anderson*, *supra*, 152 Cal.App.4th at p. 939.) CALJIC No. 2.22 has been approved by our Supreme Court. (*Ibid*.; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885; *People v. Ibarra*, *supra*, 156 Cal.App.4th at pp. 1190-1191; see also *People v. Felix* (2008) 160 Cal.App.4th 849, 858.) Further, defendant's argument disregards the fact that CALCRIM No. 226 instructed jurors they alone must determine the credibility or believability of the witnesses and set forth a variety of factors they might consider when making this determination. (*Anderson*, at p. 939.)

"The instruction mandates that the jury 'decide what evidence, *if any*, to believe,' regardless of which side introduces the evidence, but does *not* tell the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense." (*People v. Ibarra, supra,* 156 Cal.App.4th at p. 1191, italics omitted; see also

People v. Anderson, *supra*, 152 Cal.App.4th at p. 939; *People v. Felix*, *supra*, 160 Cal.App.4th at p. 858.)

Defendant "misreads the instruction, which cautions the jury, 'What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify *about a certain point*.' [Citation.] 'The instruction says nothing about choosing between prosecution and defense witnesses. It merely states the commonsense notion that the number of witnesses who have given testimony on a particular point is not the test for the truth of that point. It does no more. The jury remains free to choose the witness or witnesses it believes and what part of a witness's testimony it finds believable.'" (*People v. Ibarra*, *supra*, 156 Cal.App.4th at p. 1191, italics omitted; see also *People v. Anderson*, *supra*, 152 Cal.App.4th at p. 940; *People v. Felix*, *supra*, 160 Cal.App.4th at p. 858.) There was no misstatement of law or error in reading CALCRIM No. 302 to the jury.

C. *Correction of Court's Minute Orders and Abstract of Judgment*

The minute orders dated April 21 and August 11, 2008, and the abstract of judgment do not comport with the trial court's oral pronouncement.

First, the April 21, 2008, minute order incorrectly notes that the trial court found *four* prior strike conviction allegations to be true. However, the court found *five* such allegations true (§ § 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and *five* prior serious felony allegations (§ 667, subd. (a)) to be true.

Second, the court's August 11, 2008, minute order of the sentencing hearing contains numerous errors. It erroneously notes that the trial court struck "Prior #3" and "Prior #4" as "654 TO STRIKE ALLEGATIONS." It fails to mention the fifth prior at all. At the sentencing hearing, the trial court did not strike any of the prior serious felony convictions within the meaning of section 667, subdivision (a). Rather, it struck the two prior prison term enhancements under section 667.5, subdivision (b). The court exercised its discretion *not* to strike any of the five prior serious felony conviction enhancements and imposed a five year consecutive term for each of those five prior convictions. Hence, defendant's total sentence should be 50 years to life: 25 years to life for the substantive offense under the three strikes law, plus a five-year consecutive term for each of the five prior serious felony convictions.

The abstract of judgment reflects the same errors: a sentence of 35 years to life based on the substantive offense and imposition of only two of the prior serious felony conviction enhancements.

" . . . 'Rendition of judgment is an oral pronouncement.'" (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Entering the judgment in the minutes is a clerical function, as is the preparation of the abstract of judgment. Therefore, when the oral pronouncement of judgment is in conflict with the minutes and/or the abstract of judgment, the oral pronouncement controls. (*Ibid.*) An appellate court has the authority to order correction of clerical errors on request of either party or on its own motion. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.) We will order such correction.

III

DISPOSITION

The trial court is directed to amend its April 21 and August 11, 2008, minute orders and the abstract of judgment to reflect that defendant was sentenced as follows: 25 years to life for second degree robbery, plus five years consecutive for each of the five prior strike convictions (§ 667, subd. (a)), for a total of 50 years to life; the two prior prison term enhancements under section 667.5, subdivision (b) are stricken. As modified, the judgment is affirmed.

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RICHLI
Acting P.J.

We concur:

GAUT
J.

MILLER
J.